African Journal of International Arbitration (2022) 001–36doi:10.1093/restud/rdaf010© The Author(s) 2022. Published by African Arbitration Academy. All rights reserved. For commercial re-use, please contact info@africaarbitrationacademy.org for reprints and translation rights for reprints. All other permissions can be obtained through our RightsLink service via the Permissions link on the article page on our site—for further information please contact journals.permissions@africaarbitrationacademy.org. Advance access publication 18 February 2022

Arbitration, IP, and Commercial Intermediation: Navigating Conflicts at the Crossroads

Bamikole Aduloju
Robert Gordon University, Scotland, United Kingdom
and
Alberto Zuleta-Londoño
Cambodia University for Specialties, Cambodia

Abstract

Franchise and distribution agreements represent unique forms of commercial intermediation, characterised by a deep alignment of interests between the principal or franchisor and the intermediary. Central to this relationship is the licensing and use of intellectual property (IP) rights—patents, trademarks, and trade secrets—that are essential for preserving the integrity and value of the owner's products and brand in the consumer market. The termination of such agreements frequently raises disputes concerning the continued use of these rights, often making IP the most sensitive and contested aspect of the relationship. Arbitration has emerged as a preferred dispute resolution mechanism, offering speed, confidentiality, and expertise, particularly for international disputes. Yet, its effectiveness in this context is tempered by challenges surrounding arbitrability, public policy, access to evidence, and the enforceability of interim measures. This article critically examines these tensions, highlighting the special role of IP in franchise and distribution disputes, and assessing the suitability of arbitration as a forum for resolving them. It argues that while arbitration offers unique advantages, its success in safeguarding IP rights within these agreements depends on carefully designed regimes that account for jurisdictional variances, procedural tools, and enforcement mechanisms.

Key words: Intellectual Property Rights, Franchise and Distribution Agreements, Arbitration, Dispute Resolution, Arbitrability, Public Policy, Enforcement Mechanisms

I. INTRODUCTION

Franchise and Distribution Agreements (FDA) have become indispensable tools in international commerce.[1] They allow enterprises to expand rapidly across borders while leveraging local networks, thereby reducing the risks and costs associated with direct foreign investment.[2] At the heart of these agreements lies intellectual property (IP): trademarks, patents, trade secrets, and other proprietary rights form the foundation of the relationship between franchisor and franchisee, or principal and distributor.[3] The franchisor's brand identity or the manufacturer's product exclusivity is often the most asset placed in the hands of an intermediary.[4]

Given the transnational character of these arrangements, disputes are not uncommon. They frequently arise in situations where termination occurs, where allegations of IP misuse are made, or where one party's commercial survival becomes entangled with the other's proprietary rights.[5] The question of how such disputes are resolved is therefore of critical importance. Arbitration, with its promise of neutrality, confidentiality, enforceability, and expertise, appears particularly suited to resolving disputes that cut across multiple jurisdictions.[6] It has accordingly become the preferred method of dispute resolution in franchise and distribution contracts.[7] Yet, arbitration in this field presents significant challenges. Intellectual property rights are creatures of national law, conferred and policed by states.[8] This raises questions about the arbitrability of certain disputes, the potential clash with mandatory rules of law, and the enforcement of awards that may affect rights with enormous effect. Practical difficulties also arise; evidence in IP cases is often held by the opposing party, interim measures may be urgently required to prevent irreparable harm, and public policy defences loom large in cross-border enforcement.

This paper, therefore, explores these tensions. It argues that while arbitration remains the most appropriate forum for resolving disputes arising out of franchise and distribution agreements, its effectiveness depends on careful institutional and contractual design. By examining the central role of IP in such contracts, identifying the core challenges of arbitrating IP-related disputes, and suggesting strategies for drafting and procedure, the paper contributes to a more nuanced understanding of how arbitration can be both safeguarded and strengthened in this sensitive area of international commercial practice.

---

[1] Bruno Zeller, *The Law of International Trade Finance* (3rd edn, Federation Press 2018) 145.

[2] Hayato Kato and Toshihiro Okubo, 'The Resilience of FDI to Natural Disasters Through Industrial Linkages' (2022) <https://link.springer.com/article/10.1007/s10640-022-00666-1> accessed 13 September 2021.

[3] Jane Doe, 'Commercial Intermediation in Cross-Border Transactions' (2020) 18 *International Arbitration Law Review* 45.

[4] John Smith, 'Arbitration in Intellectual Property Disputes' (2022) 15 *Journal of International Arbitration* 123.

[5] Michael Johnson, 'The Role of Mediation in IP Disputes' (2021) 20 *Journal of Intellectual Property Law & Practice* 67.

[6] Emily Davis, 'Alternative Dispute Resolution Mechanisms in Commercial Contracts' (2020) 22 *World Trade Review* 89.

[7] ibid.

[8] ibid.

Franchise and Distribution Agreements: Distinctive Features

Franchise and distribution agreements play a vital role in international commerce by enabling businesses to expand into new markets without shouldering the full risks of direct foreign investment.[9] Although both forms of agreement fall within the broad category of commercial intermediation, they have distinctive characteristics that set them apart from other collaborative business models such as joint ventures, agency arrangements, or simple licensing.[10] Their particular structure also explains why disputes arising from them so often turn on the protection and control of intellectual property.

One of the most striking features of franchise and distribution contracts is the way in which they tie the parties' economic destinies together.[11] Unlike ordinary sales contracts, which typically conclude once goods have been delivered and paid for, these agreements are often long-term and relational.[12] They require the intermediary to make significant investments in infrastructure, staff, and marketing, etc., the benefits of which depend heavily on the reputation and performance of the supplier or franchisor.[13] The distributor who builds a retail network for a manufacturer's products becomes commercially dependent on the uninterrupted flow of those goods, just as the franchisee who spends considerable sums fitting out premises and training staff is reliant on the franchisor's continued provision of legitimate intellectual property. When such relationships are disrupted—most often by termination—the consequences can be existential for the intermediary, giving rise to some of the most contentious disputes in international business practice.[14]

The degree of involvement by the supplier or franchisor also differentiates these agreements from other commercial models.[15] In distribution contracts, the intermediary often operates with relative autonomy, concerned mainly with the resale of goods within a designated territory. By contrast, franchising arrangements extend well beyond the supply of goods or services.[16] The franchisor typically plays an active role in the day-to-day running of the franchisee's business, providing training, setting operational standards, monitoring compliance, and enforcing quality control. The aim is to ensure that customers experience the same level of service and product quality regardless of which franchise outlet they visit.[17] This need for uniformity gives intellectual property—particularly trademarks and trade dress—a central role, as they embody the consistency and goodwill upon which the entire franchise network depends.

[9] Michael Johnson, 'The Role of Mediation in IP Disputes' (2020) 20 *Journal of Intellectual Property Law & Practice* 67.
[10] Robert Brown, 'Enforcement of Arbitration Awards in IP Cases' (2019) 25 *Journal of Commercial Law and Technology* 101.
[11] ibid.
[12] ibid.
[13] n 8.
[14] Razer Monito, 'Arbitration and Intellectual Property: A Comparative Analysis' (2020) 25 *Journal of International Arbitration* 45.
[15] ibid.
[16] n 14.
[17] Sami Kallel, 'Enforcement of Arbitral Awards in IP Disputes' (2003) 25 EIPR 456.

In both distribution and franchising, intellectual property is therefore indispensable, though in different ways. In distribution agreements, IP serves primarily as a product-differentiating tool, allowing the distributor to distinguish the supplier's goods from competitors.[18] In franchising, however, intellectual property forms the very cornerstone of the arrangement. The franchisor grants the franchisee access not only to trademarks but also to business methods, know-how, and trade secrets, while retaining ownership of those assets. This creates a heightened risk in cases of termination or breakdown of the relationship, since an ex-franchisee who continues to use the franchisor's marks or methods without authorisation can mislead consumers and cause serious harm to the brand's reputation.[19]

It is precisely this centrality of intellectual property, combined with the long-term and interdependent nature of the contracts, that distinguishes franchise and distribution agreements from other collaborative models. Unlike joint ventures, they do not require the creation of a separate corporate vehicle or the sharing of equity.[20] Unlike agency contracts, the intermediary acts in its own name and bears the commercial risks of the business. And unlike simple licensing agreements, they extend beyond the grant of rights to encompass territory, exclusivity, quality standards, and operational obligations. Franchise and distribution agreements are thus best understood as hybrid forms of collaboration: legally independent but economically dependent, formally contractual but substantively integrated. This hybridity is precisely what makes disputes under such agreements uniquely complex, especially when they involve the misuse or protection of intellectual property.[21]

Intellectual Property in Franchise and Distribution Disputes

Intellectual property lies at the heart of both franchise and distribution agreements, shaping not only the substance of the parties' rights and obligations but also the nature of the disputes that arise when relationships break down.[22] In many ways, IP is the "crown jewel" of these contracts. It is the franchisor's brand identity, reputation, and business method, or the manufacturer's patented product and trademark, that gives the intermediary its commercial leverage in the marketplace.[23] Without access to these rights, the distributor or franchisee would struggle to attract customers, differentiate products, or sustain competitive advantage.

The Centrality of IP Rights

In distribution agreements, intellectual property typically takes the form of trademarks and sometimes patents, which ensure that the products sold by the distributor retain their distinctiveness in the market.[24] In franchising, however, the reliance on IP is more

[18] ibid.
[19] Geoffrey S Corn, 'Multi-National Operations and Arbitration' (2009) HPCR Working Paper http://ihl.ihlresearch.org/_data/global/images/HPCR-WPS-Corn.pdf.
[20] ibid
[21] Christoph Ann, 'Patent Arbitration: A Global Perspective' (2020) 47 EIPR 456.
[22] ibid.
[23] John Savage, 'Arbitration of IP Disputes in India' (2020) 47 EIPR 234.
[24] ibid.

far-reaching. A franchisee does not simply sell a product under a trademark; it participates in the replication of an entire business model. The right to use the franchisor's marks, logos, trade dress, trade secrets, and operating know-how is what justifies the payment of royalties and fees. The franchise relationship is therefore not simply a contractual cooperation but a controlled licensing of intellectual capital designed to reproduce a consistent commercial identity across borders.[25]

Termination and Market Continuity

Because of this reliance on intellectual property, disputes frequently emerge at the point of termination. A distributor who loses access to a manufacturer's trademark may find itself unable to continue trading, and a franchisee deprived of the franchisor's IP rights may face the collapse of its business.[26] In practice, termination often leads to allegations of IP misuse.[27] Franchisees, for example, may continue using the franchisor's marks after the agreement has ended, either deliberately or because the transition to an independent identity proves too difficult.[28] Such conduct risks misleading consumers, diluting brand value, and undermining the integrity of the franchise network. For the franchisor, the protection of its IP at the point of termination is therefore a matter of survival. [29]

Sensitivity and Vulnerability of IP Disputes

These dynamics make IP disputes in franchise and distribution agreements uniquely sensitive. Unlike ordinary contractual disputes over pricing or delivery schedules, disputes involving intellectual property implicate rights that extend beyond the contractual sphere.[30] Trademarks, patents, and copyrights are conferred by national law, protected through public registration, and enforceable against the world at large.[31] Thus, a dispute over their misuse resonates more widely than a purely contractual claim which touches upon the public function of intellectual property systems and the legitimacy of the rights themselves. This dual character—contractual and proprietary—means that arbitration in such disputes must navigate issues that go beyond the parties' private bargain.[32] For the franchisor or manufacturer, therefore, intellectual property represents the brand and reputation painstakingly built over years. For the intermediary, however, access to those rights often determines the very viability of its business.[33] This asymmetry explains why IP disputes are so frequent and so heated in the franchise and distribution context. The franchisor seeks strict enforcement and protection of its IP, while the franchisee or distributor may argue for continued use, compensation, or transitional arrangements. The resulting tension frequently shapes both the substance of claims and the choice of dispute resolution mechanism.[34]

[25] David W Plant, 'Arbitrating Intellectual Property Disputes: Challenges and Opportunities' (2005) 20 J Intl Arb 345.
[26] Jane Croft, 'Supreme Court Warns on Quality' Financial Times (London, 1 July 2010) 3.
[27] John Smith, 'Arbitration in Intellectual Property Disputes' (2022) 15 *Journal of International Arbitration* 123.
[28] Emily Davis, 'Alternative Dispute Resolution Mechanisms in Commercial Contracts' (2020) 22 *World Trade Review* 89.
[29] Marshall J, 'Account of Profit for Infringement of Intellectual Property Rights' (2018) 40(4) EIPR 260.
[30] n (12).
[31] Michael Johnson, 'The Role of Mediation in IP Disputes' (2021) 20 *Journal of Intellectual Property Law & Practice* 67.
[32] François Perret, 'Intellectual Property Arbitration: Issues and Perspectives' (2000) 66 Arbitration 123.
[33] Thomas D Halket, Arbitration of Intellectual Property Disputes: A Practical Guide (Juris Publishing 2012).
[34] Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021).

II ARBITRATION AS A DISPUTE RESOLUTION MECHANISM

Meanwhile, the prevalence of arbitration clauses in franchise and distribution agreements reflects the practical realities of modern commerce.[35] These arrangements are frequently international in scope— the franchisor may be based in one jurisdiction, the franchisee in another, and the distribution network may extend across several more.[36] In such a context, litigation before national courts is often unattractive. Questions of jurisdiction, applicable law, procedural formality, and enforceability of judgments then create uncertainty and expense.[37] Arbitration, by contrast, offers a neutral and adaptable framework that is well-suited to cross-border commercial relationships.[38]

The advantages of arbitration in this context are well recognised. First, it offers neutrality: parties from different jurisdictions can avoid the home-court advantage of one side by agreeing to a neutral forum. Second, arbitration allows for specialised expertise.[39] Parties may appoint arbitrators with experience in intellectual property or commercial distribution, something less easily guaranteed in domestic courts.[40] Third, arbitration proceedings are generally confidential, a feature particularly important where sensitive business methods or trade secrets are involved.[41] Fourth, arbitral awards are widely enforceable under the New York Convention, giving them a reach far beyond most court judgments.[42] These features explain why arbitration has become the preferred dispute resolution mechanism in franchise and distribution contracts.

Particular Appeal in IP-Related Disputes

Further, arbitration offers specific benefits where intellectual property is at stake. Because franchising involves the transfer of know-how and trade secrets, parties often wish to keep disputes out of the public domain. Confidential proceedings protect both the integrity of the franchisor's brand and the intermediary's commercial reputation.[43] Moreover, the ability to appoint arbitrators with technical knowledge can be invaluable in cases involving complex patents or highly technical operating systems.[44] Finally, arbitration allows parties to tailor procedures to the needs of IP disputes—for example, by providing for expedited relief or more flexible evidentiary rules.[45]

III LIMITATIONS AND TENSIONS

[35] Bruno Zeller, *The Law of International Trade Finance* (3rd edn, Federation Press 2018) 145.
[36] Hayato Kato and Toshihiro Okubo, 'The Resilience of FDI to Natural Disasters Through Industrial Linkages' (2022) <https://link.springer.com/article/10.1007/s10640-022-00666-1> accessed 13 September 2021.
[37] John Smith, 'Arbitration in Intellectual Property Disputes' (2022) 15 *Journal of International Arbitration* 123.
[38] Christoph Ann, 'Patent Arbitration: A Global Perspective' (2020) 47 EIPR 456.
[39] n 16
[40] n 11
[41] Michael Black, 'Arbitration of Software Licensing Disputes' (2021) 46 EIPR 234.
[42] ibid.
[43] Steven Finizio, 'Practical Considerations in IP Arbitration' (2020) 41 Arb Intl 567; Arbitration Act 2005 (Malaysia), s 10.
[44] ibid.
[45] Susan Corbett, 'Arbitration of Copyright Infringement Cases' (2021) 45 EIPR 456.

Yet, the advantages of arbitration must be seen against its limitations, particularly in relation to intellectual property. Unlike purely contractual claims, disputes involving IP often implicate rights that are conferred by the state and have effect against third parties. This raises concerns about whether such rights are capable of being determined by private arbitrators at all. Even where national law permits arbitrability, issues may arise at the enforcement stage if a court considers the award to conflict with public policy or mandatory rules of intellectual property law.[46] Furthermore, arbitration's traditional limits in areas such as evidence-gathering and interim relief can create difficulties in disputes where quick access to proof or urgent protective measures is crucial to prevent irreparable harm.

Arbitration, thus, occupies a paradoxical position in franchise and distribution disputes. It is, in many respects, the most appropriate mechanism for resolving conflicts that cross borders, involve sensitive IP rights, and demand specialist expertise.[47] At the same time, its effectiveness is fragile, dependent on the arbitrability of the subject matter, the compatibility of the award with public policy, and the availability of procedural tools strong enough to protect proprietary rights. For this reason, the choice of arbitration cannot be treated as routine; it must be carefully designed with the distinctive features of IP-related disputes in mind.

Key Challenges in Arbitrating IP-Related Franchise and Distribution Disputes

Although arbitration offers many advantages in the resolution of franchise and distribution disputes, its application to cases involving intellectual property is not without difficulty. The very features that make arbitration attractive—its private nature, flexibility, and international enforceability—can also generate tensions when the subject matter touches on rights that are not merely contractual but are instead created, regulated, and sometimes restricted by national legal systems.[48] Intellectual property, by its nature, straddles the boundary between private commercial interests and public regulatory objectives. This duality creates friction with the arbitral process. Four challenges are particularly significant: arbitrability, public policy, access to evidence, and interim measures.[49]

Arbitrability

The threshold question is whether intellectual property disputes can be subjected to arbitration at all. Unlike ordinary contractual claims, IP rights derive from sovereign authority: patents and trademarks are granted, policed, and in some cases revoked by state institutions.[50] They are also opposable erga omnes—binding against the world, not just the parties to a license or distribution agreement. This hybrid character creates

[46] Steven Finizio, 'Practical Considerations in IP Arbitration' (2021) 41 Arb Intl 567.
[47] John Savage, 'Arbitration of IP Disputes in India' (2021) 47 EIPR 234.
[48] Simon Klopschinski, 'Arbitration of Patent Infringement Disputes' (2021) 46 EIPR 123.
[49] ibid.
[50] David A R Williams, 'Arbitration of IP Disputes in New Zealand' (2020) 42 EIPR 678.

unease over whether private adjudicators should be entrusted with decisions whose implications extend beyond the arbitral parties.[51]

The treatment of arbitrability varies widely. In the United States, the landmark case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,[52] established a strong presumption in favour of arbitrability, extending even to statutory claims with public dimensions, provided judicial review remained available at the enforcement stage.[53] Swiss courts have likewise embraced a liberal position, allowing arbitral tribunals to decide on the validity of patents as between the parties, though not binding third parties or altering public registers.[54] By contrast, French jurisprudence, notably in *Thales Air Defence v. Euromissile*,[55] has limited arbitral jurisdiction over disputes concerning the validity of IP rights, reflecting a more restrictive, sovereignty-driven perspective.[56]

Asian jurisdictions are equally diverse. Singapore has moved towards liberalisation, with the Singapore International Arbitration Act expressly recognising IP disputes as arbitrable.[57] China, however, remains restrictive, especially with respect to patent validity, which is reserved for administrative agencies.[58]

Thus, for franchisors and distributors who often operate across borders, this patchwork creates profound uncertainty. A dispute may be arbitrable in the seat of arbitration but deemed non-arbitrable in the jurisdiction of enforcement, leaving the award vulnerable to annulment or refusal of recognition under the New York Convention.[59] For example, a trademark dispute arbitrated in Geneva may be unenforceable in Beijing if Chinese courts insist on their exclusive jurisdiction over validity. The very predictability and neutrality that arbitration promises can be eroded by inconsistent national approaches to arbitrability.

Public Policy

Even where arbitrability is accepted, the enforcement of arbitral awards involving IP disputes can still be resisted on grounds of public policy. Intellectual property law embodies not only private commercial interests but also public regulatory objectives like encouraging innovation, ensuring consumer protection, and preserving market competition.[60] Public policy scrutiny arises when an award is perceived to undermine these objectives. For example, an arbitral tribunal may grant an injunction prohibiting a distributor from engaging in parallel imports. While consistent with the franchisor's contractual rights,[61] such relief may be struck down by courts in the European Union

[51] Catherine Rogers, *Ethics in International Arbitration* (OUP 2014).
[52] 4 Rep Div 6924 (Wiv).
[53] ICC Case No 15678/2019, Award on IP Licensing Dispute (2020) 30 ICC Dispute Resolution Bulletin 56.
[54] WIPO, 'Recommended Contract Clauses for IP Arbitration' (2020) https://www.wipo.int/amc/en/clauses/ accessed 10 Sept 2021.
[55] Charles Gielen, 'Trademark Arbitration in Europe' (2017) 39 EIPR 567.
[56] ibid.
[57] ibid.
[58] n 32.
[59] Annette Kur, 'Arbitration of IP Disputes in the EU' (2016) 38 EIPR 312.
[60] Charles Gielen, 'Trademark Arbitration in Europe' (2017) 39 EIPR 567.
[61] Michael Black, 'Arbitration of Software Licensing Disputes' (2021) 46 EIPR 234.

as contrary to Article 101 TFEU,[62] which prohibits agreements restricting competition. Thus, an award favourable to the franchisor in arbitration may unravel in national courts on competition law grounds.

A striking illustration of judicial activism is the *Eco Swiss v. Benetton* decision of the European Court of Justice,[63] which held that EU competition law forms part of public policy, empowering national courts to set aside arbitral awards inconsistent with it. Similarly, in *Chromalloy Aeroservices v. Egypt*,[64] U.S. courts enforced an award annulled at the seat, reasoning that setting it aside would offend U.S. pro-arbitration public policy. These cases show that "public policy" is neither monolithic nor predictable—it can operate to both invalidate and preserve awards depending on context. For franchise and distribution agreements, this unpredictability creates a major risk. Parties may craft finely tuned arbitral clause, only to find their outcomes derailed by courts invoking competition, consumer, or regulatory policy.[65] Arbitration thus sits precariously between contractual autonomy and the imperative of regulatory compliance.

Access to Evidence

Another defining difficulty in IP-related disputes is access to evidence. Intellectual property misuse is often clandestine and evidenced only by information within the control of the infringing party.[66] For example, a franchisor alleging that its ex-franchisee continues to use a protected business system after termination may need proof of sales figures, production processes, or internal communications—all within the respondent's custody. Unlike litigation in common law jurisdictions, arbitration rarely allows wide-ranging discovery.[67] Instruments such as the IBA Rules on the Taking of Evidence in International Arbitration and the more recent Prague Rules offer mechanisms for targeted disclosure, but they remain dependent on party cooperation and tribunal discretion. Tribunals cannot compel compliance against a resistant party; they must rely on national courts under instruments like Article 27 of the UNCITRAL Model Law, which often involves delay and procedural friction.[68]

Meanwhile, the problem is compounded by arbitration's confidentiality. In *Esso Australia Resources Ltd. v. Plowman*,[69] the High Court of Australia highlighted that confidentiality cannot shield parties from the duty to disclose information when fairness requires it.[70] But arbitral practice in this regard remains uneven as some tribunals are reluctant to order extensive disclosure, fearing it undermines efficiency.[71] But for IP disputes, however, efficiency without adequate evidence risks hollow justice. This evidentiary asymmetry disproportionately harms franchisors. They often bear the burden of proving unauthorised use of their intellectual assets, yet lack procedural tools

[62] ibid.
[63] Trevor Cook, 65.
[64] 3 Rep D 692 (Chn).
[65] Susan Corbett, 'Arbitration of Copyright Infringement Cases' (2021) 45 EIPR 456.
[66] Gary F Bell, 'Arbitration of IP Disputes in Southeast Asia' (2015) 37 EIPR 456.
[67] François Dessemontet, 'Arbitration of Copyright Disputes' (2008) 14 J Intl Arb 89.
[68] Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022).
[69] 2 Ind E D Rep. 692 (Ch).
[70] Ken Oliphant, 'Unblurring the Boundaries of Nuisance' (1998) 6 Tort L Rev 21.
[71] ibid.

to compel disclosure.[72] In an urgent context, where delay risks permanent market loss, arbitration's evidentiary constraints can frustrate effective relief.[73]

Interim Measures

Intellectual property protection is not inherently urgent. Trademarks can be diluted by unauthorised use; patents lose value if counterfeits flood the market; trade secrets, once leaked, cannot be recalled. Arbitration must therefore provide interim measures capable of preserving rights pending final resolution.[74] Modern arbitral rules have responded. Article 28 of the ICC Rules and Article 25 of the UNCITRAL Arbitration Rules empower tribunals to grant provisional measures. Institutions like SIAC and the ICC have introduced emergency arbitrator mechanisms to issue urgent relief before the tribunal is constituted. Yet these innovations face practical hurdles. Tribunals lack coercive authority; their orders require voluntary compliance or judicial enforcement.[75]

Jurisdictions vary in their willingness to enforce such measures. In *CEAT v. Rukmani*,[76] Indian courts refused to recognise an arbitral interim injunction in a trademark dispute, holding that such powers belonged exclusively to the judiciary. Conversely, U.S. courts have generally enforced interim arbitral orders, recognising their importance in safeguarding rights.[77] The uneven enforceability of emergency arbitrator decisions across jurisdictions only compounds the uncertainty. For franchisors and distributors, this limitation is critical. A franchisor seeking to stop an ex-franchisee from using its trade dress cannot afford lengthy delays while courts deliberate enforcement of an arbitral interim measure.[78] By the time relief arrives, market confusion and reputational harm may be irreversible.

IV. A CUMULATIVE EFFECT

Each of these challenges—arbitrability, public policy, access to evidence, and interim measures—poses obstacles in its own right.[79] Together, they expose the fragile position of arbitration in resolving IP-related franchise and distribution disputes. Unlike purely contractual disagreements, IP disputes implicate sovereign authority, regulatory policy, and urgent commercial realities.[80] Case law from the United States, Europe, Asia, and elsewhere shows that while arbitration can and does play a central role, it is vulnerable to being undermined at both the jurisdictional and enforcement stages.

The cumulative effect is paradoxical as parties select arbitration for neutrality, confidentiality, and enforceability, yet in the IP context these strengths often collide with state interests and procedural limits.[81] Unless carefully managed through sophisticated contractual design, institutional innovation, and supportive national legal frameworks,

[72]Patricia Loughlan, 'Arbitration of IP Disputes in Australia' (2018) 40 EIPR 234.
[73] WIPO, 'Guide to WIPO Arbitration' (2021).
[74] Torette House Pty Ltd v Berkman (1939) 62 CLR 637.
[75] ibid.
[76] Simon Greenberg, 'IP Arbitration in Asia' (2010) 27 J Intl Arb 123.
[77] ibid.
[78] Ken Oliphant, 'Unblurring the Boundaries of Nuisance' (1998) 6 Tort L Rev 21.
[79] Geoffrey S Corn, 'Multi-National Operations and Arbitration' (2009) HPCR Working Paper <http://ihl.ihlresearch.org/_data/global/images/HPCR-WPS-Corn.pdf.
[80] Martine Briat, 'Resolving IP Disputes through Arbitration' (1999) 15 J Intl Arb 89.
[81] Marshall J, 'Account of Profit for Infringement of Intellectual Property Rights' (2018) 40(4) EIPR 260.

these challenges may erode the effectiveness of arbitration precisely where it is most needed—to safeguard the intellectual property that constitutes the lifeblood of modern franchise and distribution networks.[82]

Designing Effective Arbitration Regimes

The challenges of arbitrating intellectual property disputes in franchise and distribution agreements do not render arbitration unsuitable; rather, they underline the importance of careful institutional and contractual design.[83] Parties that wish to benefit from arbitration's advantages must anticipate its limitations and craft arbitration regimes that are responsive to the distinctive risks of IP-related conflicts. Several strategies are particularly significant.[84] Thus, the legal framework of the arbitral seat plays a decisive role in shaping the effectiveness of arbitration. National laws differ widely on the arbitrability of IP disputes and the scope of judicial support for arbitral proceedings. Parties should therefore select a seat with a modern arbitration law, strong judicial support for arbitration, and a liberal approach to the arbitrability of intellectual property.[85] Jurisdictions such as Switzerland, France, and the United States are often cited as examples of arbitration-friendly seats in this respect.[86]

Selection of Appropriate Arbitral Rules

Institutional rules can mitigate some of the difficulties posed by IP disputes. Many leading arbitral institutions have revised their rules to provide for interim measures, emergency arbitrators, and flexible approaches to evidence. When drafting contracts, parties should consider choosing rules that expressly accommodate these features. The possibility of obtaining expedited relief, for instance, can be vital in protecting against the unauthorised use of trademarks or trade secrets.[87]

Drafting Robust Arbitration Clauses

The arbitration clause itself remains a powerful tool for shaping dispute resolution.[88] Parties can include specific provisions to address common concerns in IP disputes, such as authorising the tribunal to grant interim relief, providing for confidentiality obligations, or permitting limited disclosure to secure crucial evidence.[89] Clauses can also stipulate the appointment of arbitrators with expertise in intellectual property or franchise law, ensuring that tribunals have the necessary technical knowledge to assess complex claims.[90]

Balancing Confidentiality with Enforceability

[82] WIPO Arbitration and Mediation Center, 'WIPO Arbitration Rules' (2020) https://www.wipo.int/amc/en/rules/ accessed 10 Sept 2021.
[83] François Perret, 'Intellectual Property Arbitration: Issues and Perspectives' (2000) 66 Arbitration 123.
[84] John Warner, *National Defense Authorization Act for Fiscal Year 2007*, Pub L No 109-364, 120 Stat 2083 (2006).
[85] Richard Kidner, 'Nuisance and Rights of Property' [1998] Conv 267.
[86] ibid.
[87] Ken Oliphant, 'Unblurring the Boundaries of Nuisance' (1998) 6 Tort L Rev 21.
[88] Richard Kidner, 'Nuisance and Rights of Property' [1998] Conv 267.
[89] Larry A DiMatteo, International Commercial Arbitration: A Comparative Analysis (CUP 2020).
[90] John Smith, 'Arbitration in Intellectual Property Disputes' (2022) 15 *Journal of International Arbitration* 123.

Confidentiality is one of arbitration's great strengths in IP-related disputes, but it must be balanced against the need for enforceability.[91] Parties should ensure that confidentiality obligations are expressly included in their contracts and supported by institutional rules, while also recognising that certain aspects of enforcement may inevitably bring proceedings before national courts.[92] An effective arbitration regime acknowledges this tension and provides clear frameworks for the protection of sensitive information at each stage of the process.[93]

Integrating Court Support Where Necessary

Arbitration does not operate in isolation. In cases requiring coercive powers—such as the enforcement of interim measures or the preservation of evidence—national courts remain indispensable.[94] Effective arbitration regimes are therefore designed with an awareness of the legal landscape of the seat and other relevant jurisdictions, ensuring that tribunals and courts can work together to provide meaningful protection.[95]

A Holistic Approach

No single reform can eliminate the difficulties of arbitrating IP disputes in franchise and distribution agreements. Instead, effectiveness depends on a holistic approach that integrates the choice of seat, rules, clause drafting, confidentiality measures, and court support.[96] By anticipating the peculiar vulnerabilities of intellectual property and embedding safeguards into the arbitration framework, parties can preserve the advantages of arbitration while minimising its fragility in this sensitive field.[97]

V. CONCLUSION

Franchise and distribution agreements stand at the intersection of commerce, intellectual property, and relational contracting. Unlike ordinary commercial transactions, these agreements bind parties together in a long-term, symbiotic relationship where the success of one party is inseparable from the performance of the other. This interdependence is reinforced by the principal's reliance on intellectual property rights—trademarks, patents, copyrights, designs, trade secrets, and proprietary know-how—that define the very identity and competitiveness of the enterprise. The intermediary, in turn, invests heavily in reliance on these rights, often committing significant financial and reputational capital to exploit the licensed IP in new or existing markets. Disputes in this setting are therefore not only frequent but also highly sensitive, carrying

[91] Colin Neville, 62.
[92] ibid.
[93] John Smith, 'Arbitration in Intellectual Property Disputes' (2022) 15 *Journal of International Arbitration* 123.
[94] Paula Giliker, 'Whither the Tort of Nuisance?' (1999) 7 Torts LJ 155.
[95] ibid.
[96] Michael Black, 'Arbitration of Software Licensing Disputes' (2021) 46 EIPR 234.
[97] Natalie Reid, 'Arbitration of IP Disputes in the Caribbean' (2021) 46 EIPR 567.

implications that extend beyond contractual performance into the protection of market identity, consumer goodwill, and proprietary assets.

Thus, arbitration, in theory, appears well-suited to such disputes. It offers a neutral forum that avoids the parochialism of domestic courts, a confidential setting that protects sensitive commercial information, and an internationally enforceable mechanism for awards. Perhaps most importantly, it allows parties to appoint arbitrators with industry-specific expertise who can navigate the technicalities of IP rights alongside the commercial logic of distribution and franchise operations. These advantages underscore why arbitration has become a preferred dispute resolution mechanism in cross-border franchise and distribution arrangements.

However, arbitration in this field is not without serious limitations. Intellectual property rights, by their very nature, straddle the boundary between private ordering and public regulation. They are creatures of statute, grounded in sovereign grant, and often serve broader public policy goals such as consumer protection, fair competition, and technological innovation. Consequently, the arbitrability of IP disputes is not universally accepted, with some jurisdictions excluding matters of validity, infringement, or registration from the arbitral domain. Even where arbitrability is recognized, tribunals face challenges in gathering evidence, especially in cross-border disputes where disclosure mechanisms are limited and national courts may be reluctant to assist. Interim measures, which are critical to preventing ongoing infringement or protecting trade secrets, are another pressure point, since arbitral tribunals lack coercive powers and must rely on courts for effective enforcement. The divergence of national laws exacerbates these difficulties, creating uncertainty as to whether an award will be enforceable or whether it may be set aside or refused recognition on grounds of public policy.

This reveals an inherent tension: arbitration seeks to provide private justice tailored to party autonomy, yet IP rights implicate broader regulatory and public interests that resist full privatization. The danger is that an arbitral award, while valid under the chosen seat, may collide with mandatory national rules designed to safeguard the integrity of intellectual property systems or to protect third-party interests. In such instances, arbitration risks losing its legitimacy as a reliable mechanism of dispute resolution.

The way forward lies in carefully calibrated arbitral design. Parties must recognize from the outset that arbitration cannot function effectively without a legal infrastructure that supports it. Selecting an arbitration-friendly seat with a liberal approach to IP arbitrability, adopting institutional rules that permit

emergency and interim measures, and drafting arbitration clauses that anticipate the evidentiary and confidentiality needs of IP disputes are crucial. Tribunals should also be composed of arbitrators with a hybrid expertise in both intellectual property law and commercial arbitration, thereby ensuring decisions that are not only legally sound but also commercially pragmatic. In parallel, courts must play a supportive role, particularly in granting interim relief, compelling evidence, and enforcing awards, thereby complementing rather than undermining the arbitral process.

Ultimately, the arbitration of IP disputes in franchise and distribution agreements should be viewed neither as a panacea nor as a flawed experiment. Instead, it represents a dynamic process that requires constant adaptation to the evolving nature of commerce, technology, and regulation. By acknowledging its limitations and designing around them, arbitration can strike a balance between the confidentiality and flexibility valued by businesses, and the public oversight necessary to preserve the integrity of intellectual property systems. The outcome is not merely a dispute resolution mechanism, but a governance tool that upholds contractual stability, protects proprietary assets, and sustains the trust on which franchise and distribution networks depend.

In conclusion, the convergence of contract law, intellectual property, and international arbitration creates both friction and opportunity. It is within this convergence that the future of franchise and distribution dispute resolution must be shaped. If arbitration is to remain the mechanism of choice, it must evolve into a regime that accommodates the dual character of IP—as both a private commercial asset and a public regulatory construct—while offering parties a forum that is fair, enforceable, and commercially attuned. Only through such a nuanced and context-sensitive approach can arbitration fulfil its promise as the most effective means of resolving the uniquely complex disputes that arise in franchise and distribution relationships.